importance of money in Vermont's political campaigns leaves average citizens unwilling and unable to participate in the system. At trial, one expert testified that "nearly 75 percent of Vermont voters say that ordinary voters do not have enough influence over Vermont politics and government, and more than two thirds believe that 'large corporations and wealthy individuals have too much influence.'" *Landell*, 382 F.3d at 116 (expert report of Celinda C. Lake). Extensive evidence showed that the endless race for campaign funds hindered "public involvement and confidence in the electoral process" *id.* at 100, and that large donors were able to affect the legislature's agenda. *Id.* at 117. As the Court of Appeals for the Second Circuit recognized, "[w]here access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power." *Id.* at 119.

The detailed findings below also show that Vermont's system of unchecked expenditures created an "arms race" mentality in which each candidate felt compelled to raise the maximum amount possible because of the constant concern about being outspent. *Id.* at 117. Witnesses testified at trial that special interests wielded great influence on candidates in Vermont: "[P]ublic officials [were] functionally compelled to sell privileged access through the fundraising system." *Id.* at 100. Elected officials testified that they were wary of opposing too many special interests because those interests would stop providing campaign funds. *Id.* at 117.

Vermont also presented potent evidence that the pressure to raise large sums of money required elected officials to spend an inordinate amount of time courting large donors and less time on their official duties. *Id.* at 123. Numerous witnesses testified that, in the absence of spending limits, candidates and elected officials felt compelled to give access to large contributors over private citizens who do not or cannot make campaign contributions. At trial, Vermont

presented striking survey data that showed that 85% of Vermonters were concerned that "political fundraising took away time from important government business." *Id.* at 123. (testimony of Celinda C. Lake).

After 65 hearings involving testimony from 145 witnesses on the pervasive influence of money on the State's political system, the Vermont Legislature determined—by an overwhelming majority and with strong bipartisan support—that limits on *campaign spending*, in addition to limits on contributions, were essential to effect meaningful campaign finance reform.[5] In light of the hugely escalating pressures to raise and spend exorbitant amounts to maintain viable candidacies, this Court should uphold Act 64's campaign expenditure limits as the only realistic means for furthering Vermont's compelling interests in combating corruption and the appearance of corruption, and in protecting the time of candidates and elected officials. Properly tailored campaign expenditure limits are both constitutionally permissible *and necessary* to ensure that all Americans have equal footing in our Nation's process of governance.

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[5] The District Court found that Act 64's spending limits would allow officeholders more time to attend to their duties, protect access to the political arena, and preserve Vermont's citizens' faith in democracy. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 483 (D.Vt. 2000) (citations omitted). Although the District Court ultimately determined that Act 64's expenditure limits were unconstitutional, it noted that, based on the wealth of evidence in support of spending limits, it "underst[ood] why [the Vermont Legislature] included spending limits as part of its comprehensive campaign finance bill." *Id.* at 483. The Second Circuit Court of Appeals held that the Vermont Legislature established at least two interests to maintain campaign expenditure limits: deterring corruption and its appearance and protecting the time of candidates and elected officials. *Landell*, 382 F.3d at 124.

B. The Unparalleled and Escalating Levels Of Campaign Spending Severely Restrict Access of Minority and Low-Income Communities to the Political Process.

A large majority of voters, and especially minority voters, perceive the political process as subject to pervasive and corrupting influence by a few wealthy individuals and corporations. Members of minority groups are severely underrepresented among donors to political campaigns, and are increasingly politically marginalized as the amounts donated increase. In an America where the vast majority of campaign contributors are non-Hispanic white, communities of color perceive an endemic corruptive influence in campaign spending that, as time has proven, can only be entirely eliminated by direct restrictions on expenditures.

As has been well documented, running for office has become an extraordinarily expensive undertaking. In the 2002 and 2004 election cycles, candidates for the U.S. Senate and House of Representatives raised nearly two billion dollars. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: STATS AT A GLANCE, *at* http://www.opensecrets.org.[6] The 2004 presidential race was also the most expensive in history, with both parties' nominees forgoing public funding in the primary and raising nearly $650 million between them. *Id.* In 2002, the average winning candidate for the United States House of Representatives raised nearly $1 million; the average winning candidate for the Senate raised over $5.2 million. *Id.*

Although more attention has been focused on federal

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[6] Portions of these arguments are drawn from Brief of *Amici Curiae* The National Association for the Advancement of Colored People et al., et al. in Support of Petitioners, in *City Of Albuquerque v. Homans*, No. 04-413, prepared by the law firm of Howard Rice Nemerovski Canady Falk & Rabkin.

election spending, there is big money in state government politics as well. A nationwide study on the 2000 state legislative and gubernatorial elections showed that candidates running for a House seat raised an average of $46,123; their Senate counterparts raised over twice that amount, an average of $100,976. EDWIN BENDER & SUE O'CONNELL, THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW 6 (Aug. 2002). The fifty-nine major party gubernatorial candidates spent a combined $115.3 million—an average of nearly $2 million per candidate. *Id.* at 8. *See also* SUE O'CONNELL, THE INSTITUTE ON MONEY IN STATE POLITICS, 2002 STATE ELECTIONS OVERVIEW 2 (Nov. 2004) (candidates for state-level offices raised $2.1 billion in the 2001-02 election cycle).

More significant than the bare numbers, however, is the direct impact that the ability of a candidate to raise money has on his or her chances of winning. In the 2002 Congressional primaries, candidates who raised the most money won in nine out of ten races. ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 7 (Jan. 2003) (hereafter "PIRG Study"). In the general elections, 94% of the biggest fundraisers emerged victorious. *Id.* Incumbents raised vastly more money than their challengers and were extraordinarily successful: 98% of House incumbents were reelected and 85% of Senate incumbents were reelected. CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE, *at* http://www.opensecrets.org. The thirteen winning gubernatorial candidates outspent their opponents by an average of $1.2 million (on average winners raised $4.1 million, and losers $2.9 million). *Id.* at 8.

Candidates who lack personal wealth[7] or access to networks of wealthy donors, or whose positions do not appeal to large contributors, are unable to compete. A 2003 survey by the U.S. PIRG of federal candidates in the 2002 election cycle who dropped out of races, lost primaries or lost general elections shows how credible candidates, including many candidates of color who are committed to representing communities in great need of representation, are unable to raise the funds necessary to compete.[8] In 42 out of 50 states, minority legislators who were members of state legislatures in 2003 on average raised less money than their white counterparts. SAMANTHA SANCHEZ, THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES, 2003 22 (April 2005). Individually, 81.5 percent of all minority state legislators raised less money than the average raised by the white candidates in their state.[9]

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[7] Nearly 43% of the incoming freshman Members of Congress in 2002 were millionaires, compared with 1% of the U.S. voting age population. PIRG Study, *supra*, at 6.

[8] While minorities make up 30.9 percent of the U.S. population, they made up only 11.3 percent of the members of state legislatures in 2003. THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES, 2003 5, 20 (April 2005). In fact, legislatures in all 50 states failed to reflect the diversity of their state's population. *Id.*

[9] In 36 of the 42 states (where 607 African American legislators were elected), African American legislators raised less on average than did white legislators, including several states with substantial numbers of African American lawmakers. SANCHEZ, MONEY AND DIVERSITY, *supra*, at 7. In 19 of the 27 states (where 140 Latino legislators were elected), Latino legislators raised less on average than white legislators, including several states with substantial Latino representation. *Id.* at 10. Asian Pacific American legislators raised less money than white legislators, on average in seven of the 11 states (where 72 APA legislators were elected). *Id.*

(continued . . .)

Id. See also Jason P. Conti, *The Forgotten Few: Campaign Finance Reform and its Impact on Minority and Female Candidates*, 22 B.C. THIRD WORLD L.J. 99 (2002) (challenger minority candidates have a more difficult time raising money than white candidates).

The imperative to raise thousands of dollars gives the very small segment of the population capable of writing very large checks undue influence in determining who will be elected. In the 2002 election, less than one-quarter of one percent of the voting age population made a contribution of more than $200 to a congressional candidate. ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (July 2003). Less than one-tenth of one percent of the population made a contribution of $1,000 or more. *Id.* Yet this handful of large donors contributed over three-quarters of the individual contributions to congressional candidates. *Id.* at 16–17.

The donors who fund these expensive races are an elite group whose demographics bear little relationship to the country at large. This was the conclusion of a nationwide survey of over 1,000 donors who gave at least $200 to congressional candidates in the 1995–96 election cycle. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUBLIC PERSPECTIVE 29 (2000). The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. *Id.* at 29–30. The researchers concluded that "donors to House and Senate

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(. . . continued)

at 13. In 10 of the 11 states (where 36 Native Americans were elected), Native Americans raised less, on average, than white legislators, even in states with the highest Native American representation. *Id.* at 16.

candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of the donors surveyed had annual incomes of over $100,000, and over 80% were college graduates. *Id.* Among the most active donors, over half had incomes of over $500,000, and only four percent had incomes of less than $100,000. *Id.* *However, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race:* 99% of the donors were non-Hispanic white.[10] *Id.*

Minorities are left out of this critical political arena because making significant contributions requires a degree of disposable income that few minorities possess. Despite the gains of the Civil Rights Movement, the racial gap in family income has remained constant over the past twenty years. MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004). In 2000, the median African American family had an income equal to the national median *in 1965.*[11] *Id.* at 13.

The gap in wealth between non-Hispanic whites and minorities is even more striking. Between 1996 and 2002, the median African American and Hispanic household wealth

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[10] Similarly, a recent study of donors to the 1972, 1988 and 2000 presidential primary campaigns by Clyde Wilcox, Professor of Government at Georgetown University, found that among donors of $200 or more, 86% had incomes over $100,000, and approximately 96% of these donors were non-Hispanic white. Clyde Wilcox, *Individual Donors in the Presidential Nomination Process*, Tables 2 and 3 *in* THE CHANGING DONOR? INDIVIDUAL CONTRIBUTORS IN PRESIDENTIAL ELECTIONS 1972–2000 (Alexandra Cooper et al. eds., forthcoming).

[11] In 2000, the median annual family income was $52,000 while the median African American family income was $31,000. Stoll, *supra*, at 13.

declined by 27%—while the median non-Hispanic white household wealth increased by 2%. RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 AS OF 2002 2 (Oct. 2004). The median white household wealth was $88,651—nearly fifteen times that of the median African American household wealth, which was $5,988, and eleven times that of the median Hispanic household wealth, which was $7,932. *Id.* *See also* Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002) (because people of color have lower incomes, less wealth, fewer business interests, and higher poverty rates, their ability to contribute or spend political money is severely limited).

Public Campaign, a nonpartisan public interest organization, studied the relationship between campaign money and race. In its study, *The Color of Money: 2003*, Public Campaign organized by donors' ZIP code more than $2 billion in individual contributions of more than $200 to federal candidates, parties and Political Action Committees during the 2000 and 2002 election cycles. PUBLIC CAMPAIGN, THE COLOR OF MONEY: 2003 1 (Major Findings) (2003). Public Campaign then compared these data with data from the 2000 U.S. Census on race, ethnicity and income by ZIP code, using ZIP codes as the bridge between information on campaign contributions (which does not include race or ethnicity of donors) and the census data.

Public Campaign's analysis showed that neighborhoods comprised mostly of people of color are severely underrepresented in the campaign finance system. Nearly 90% of the more than $2 billion contributed by individuals in the two most recent federal elections came from ZIP codes that are majority non-Hispanic white ($1.7 billion—85%—came in the form of contributions of $1,000 or more). In comparison, just 2.8% of campaign funds came from predominantly African American ZIP codes, 1.8% from predominantly Latino ZIP codes, and .6% from

predominantly Asian Pacific American neighborhoods. *Id.* at 2. The top contributing ZIP code nationwide—10021 on Manhattan's Upper East Side—is 86% non-Hispanic white, and nearly 40% of its households have incomes of over $100,000.

Strikingly, this one ZIP code contributes more campaign cash than the 532 ZIP codes nationwide with the largest percentage of African-American residents (representing 7,654,609 people ages 18 and over—84 times more people than live in 10021); the 533 ZIP codes nationwide with the largest percentage of Latino residents (representing 9,355,643 people ages 18 and over—102 times more people than live in 10021) and the 167 ZIP codes nationwide with the largest percentage of Asian Pacific-American population (representing 3,523,852 people ages 18 and over—39 times more people than live in 10021). *Id.* at 2. *See also* PUBLIC CAMPAIGN, THE COLOR OF MONEY: THE 2004 PRESIDENTIAL RACE 3, 16, 18 (2004) (finding that President Bush collected 537 times more cash from top contributing majority non-Hispanic white ZIP codes than from ZIP codes with the highest percentage of people of color nationwide, and Senator Kerry, 452 times as much).

Thus, the evidence demonstrates first, and unsurprisingly, that the most affluent members of American society are vastly overrepresented in political giving and, second, that minorities, who are overrepresented among the lowest economic levels in America, are severely underrepresented among campaign donors. *See* Spencer Overton, *Voices From The Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1541 (2001) ("observ[ing] that a history of discrimination has contributed to current racial disparities in property distribution which are, due to the current campaign finance system, replicated in political participation."). Economic inequality and racial disparity, along with the escalating dependence of political leaders on campaign contributions, threaten to imperil the

fundamental principle of equal representation in American politics. Campaign expenditure limits, as contained in Act 64, would foster effective representation and equal access to the political arena for all communities—including those most in need—people of color and the poor.

II. Because The Opportunity For Political Participation For All Citizens Is Fundamental To American Democracy, Furthering Realistic Opportunities For Minority And Low-Income Participation In The Political Process Is An Additional Basis For Reasonable Limits On Campaign Spending.

A campaign finance system without expenditure limits excludes those without the means to compete in fundraising, many of whom are members of racial minority groups. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court recognized that government has an essential interest in promoting equal political participation by acknowledging the effects of racial discrimination in our country: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. This Court stated in *Grutter* that this compelling interest arises in part because universities, and in particular, law schools, are training grounds for many of the nation's leaders: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

But government's interest in promoting a visibly open path to leadership does not end at the gates of universities and law schools. The electoral process is the primary gateway to leadership in our democratic society, and the government has a vital interest in keeping that process open to all members of society. As we work together as a country

to provide equal educational opportunity to minority students (and full participation at all levels in our armed forces), we undermine our accomplishments if we effectively deprive the graduates of these programs of office, of access, and of a sense that government is understanding of and receptive to their views.

The governmental interest in promoting equal political participation has been endorsed in several cases decided by this Court. In *McConnell v. Federal Election Commission*, this Court acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government are interests of the highest importance." 540 U.S. 93, 206 n.88 (2003) (citation and internal quotation marks omitted). Equal political participation interests were also at stake in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where this Court upheld a prohibition on corporate expenditures designed to combat "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. Indeed, the interests of the government in encouraging equal political participation are integrally related to the government interests in preventing corruption and the appearance of corruption set forth in *Buckley*. An unequal election in which only a select number of high bidders can meaningfully participate—an election that appears to be up for sale—will appear corrupt.

This Court's decisions based on the Equal Protection Clause striking down wealth barriers to voting and running for office also address the constitutional issues at stake. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966), the Court invalidated a poll tax of $1.50 in Virginia state elections, declaring that "Voter qualifications have no relation to wealth. . . ." Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of

candidates, regardless of wealth, to participate meaningfully as well. *See id.* In *Bullock v. Carter*, 405 U.S. 134, 144 (1972), the Court recognized the "real and appreciable impact on the exercise of the franchise" caused by a system that excludes candidates on the basis of their lack of wealth, and struck down filing fees ranging from $150 to $8,900 that candidates for local office in Texas were required to pay to their political parties. The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support.

Id. at 143. "[W]e would ignore reality," the Court continued, "were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144. *See also Lubin v. Panish*, 415 U.S. 709 (1974) (striking down $700 filing fee for local California election).

America's constitutional Framers recognized that "establishing a political equality among all" was a primary remedy for calling democratic representatives to account.[12] Economic barriers to full participation in the political process fall most heavily on minorities and touches on the most precious of constitutional interests. Congress recognized these interests when it enacted the Voting Rights Act in response to "an upsurge of public indignation against the

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[12] 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983); *see also* THE FEDERALIST NO. 57, at 305, 386 (James Madison) (J. Cooke ed., 1961).

systemic exclusion of Negroes." H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to the Act's passage, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465–66 (General Statement of Republican Views). *See also* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239, 264-65, 291 (forthcoming 2005) (Courts should weigh whether a campaign finance measure "appropriately serves the goals of increasing equality and reducing the concentration of power in the hands of the few, as articulated in the Voting Cases.").

Even as it enacted major reform, Congress predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and re-entrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . . It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices.

H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. at 2471.

The corruption predicted in 1965—ballot stuffing and coercion of voters—was, of course, of a different variety than exists today. There are other types of unfair influence that

now beset our political system and shut out those most in need of representation. Without the ability to limit the unceasing race for funds, candidates for office are forced to give access and time to those who can provide money. The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. As Justice Breyer suggested in a recent discussion of this passage, however, "those words cannot be taken literally." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000). (Breyer, J., joined by Ginsburg, J., concurring). The Constitution, he points out,

> often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.

Id. (citations omitted).

One valid basis for upholding limits on campaign expenditure limits is that "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. Cf. *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964) (in the context of apportionment, the Constitution 'demands' that each citizen have 'an equally effective voice')." *Id.* at 401 (citations omitted). This Court's approach should be informed by the fact that "constitutionally protected interests lie on both sides of the legal equation." *Id.* at 400.

Today what must be wholly foreign is a political system in which free speech is measured only in dollars and

major segments of society are left disaffected and ultimately as powerless to influence choice of candidates and public policy as they were decades ago. If this is the teaching of *Buckley*, *Amici* urge that it be revisited and modified or overturned. Legislators and citizens can and should be permitted to balance competing and compelling government interests in equal participation, absence of corruption, and broad buy-in to government with carefully drawn limits that still protect, and indeed encourage and permit, broad communication of ideas and positions. That is the system Vermont implemented in 1997 and *Amici* ask that it be sustained.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to grant the petitions for writ of certiorari with respect to the first question presented in each petition and uphold Act 64's campaign expenditure limitations. *Amici* further urge this Court to deny review of the remaining questions presented in the petitions, as none of them presents an issue warranting this Court's consideration.

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF SENATOR JOHN F. REED, SENATOR ARLEN SPECTER, SENATOR MARIA E. CANTWELL, SENATOR CHRISTOPHER J. DODD, SENATOR RICHARD J. DURBIN, SENATOR EDWARD M. KENNEDY, SENATOR CARL LEVIN, SENATOR CHARLES E. SCHUMER IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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INTEREST OF AMICI

Amici, Senator John F. Reed, Senator Arlen Specter, Senator Maria E. Cantwell, Senator Christopher J. Dodd, Senator Richard J. Durbin, Senator Edward M. Kennedy, Senator Carl Levin, Senator Charles E. Schumer are a bipartisan group of United States Senators.[1] The personal experiences of *amici*, as candidates and members of Congress, since this Court's decision in *Buckley* demonstrate the need for clearer and more comprehensive authority to vindicate the central premise in *Buckley*—that the government has a compelling interest in ensuring faith in the integrity of the political process. *Amici* advocate, and seek to enact, reforms to vindicate that compelling interest. As both elected representatives and seasoned participants in the electoral process, *amici* believe they are entitled to broad deference in the regulation of federal elections. The Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), properly accorded legislatures such deference with regard to contribution limits. The Court should clarify that equivalent deference is warranted with respect to the expenditure limits at issue here and extend it to campaign finance reforms in general. Without additional reforms, the public faith's and participation in the political process will continue to decline. Such reforms can be enacted without infringing upon First Amendment rights and without stifling the public debate essential to the functioning of our democracy. Indeed, such reforms will enhance the public debate that is the foundation of our democratic process.

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[1] No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with petitioners that this Court should grant certiorari on the first question presented in the petitions—whether limitations on expenditures by candidates for state political office invariably violate the First Amendment. The Circuits are in direct and acknowledged conflict on that question. In this case, the Second Circuit has held that expenditure limits are not inevitably foreclosed by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), whereas the Sixth and Tenth Circuits have squarely held that *Buckley* categorically prohibits such laws. *See Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998).

Although *amici* support review of the campaign expenditure question in the petitions, their reasons for doing so are markedly different from those set forth in the petitions for certiorari. In pressing their arguments for review, petitioners contend that the First Amendment, as interpreted and applied by this Court in *Buckley*, forecloses expenditure limits under any circumstances, and that this is a proper understanding of the First Amendment. *Amici* have a different view. Specifically, *amici* believe *Buckley* can and should be read to provide governments with the leeway to impose campaign expenditure limitations if supported by a record of compelling state interests sufficient to support the limitations. Even more fundamentally, *amici* believe the premises of *Buckley* regarding expenditure limitations are ripe for re-examination in light of the three decades of experience under the regime of campaign finance regulation dictated by *Buckley*.

As the Court recognized in *McConnell v. FEC*, 540 U.S. 93 (2003), nothing in the three decades of experience since *Buckley* calls into question the Court's decision to uphold the legislative judgment that campaign contribution limits are essential to preserving the public's faith in the electoral process and our representative institutions. Rather, the accumulated experience of Members of Congress, reinforced by empirical evidence, is that the dominance of money in politics continues to threaten the public's faith in the legitimacy of government and in the elections that choose whom shall govern—notwithstanding the existence of contribution limits of the kind upheld in *Buckley*. The issue presented in this case is thus simply not about censorship. Here "constitutionally protected interests lie on both sides of the legal question." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). There must be leeway for the government to address the core societal interest, recognized by this Court, *see Buckley*, 424 U.S. at 26-27, in ensuring the integrity—in every sense of the word—of our representative system of government. In *Shrink Missouri*, and even more emphatically in *McConnell*, this Court reaffirmed the importance of the competing constitutional interests at stake in the arena of campaign finance regulation—and the compelling nature of the government's interest in preserving the integrity of the electoral process.

The instant case provides an appropriate opportunity for the Court to reassess the strength of governments' interest in imposing candidate expenditure limitations in light of the experience of the last three decades under *Buckley*. *See Cf. FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 n.8 (2001) (noting that, while the FEC had not asked the Court in that case to revisit expenditure limits,

"some have argued that such limits could be justified in light of post-*Buckley* developments in campaign finance") (citations omitted). More generally, this case presents an appropriate occasion for the Court to make clear that the First Amendment does not hamstring legislators' attempts to protect the viability of our very structure of government. "[F]or while the Constitution protects against invasions of individual rights, it is not a suicide pact" requiring Congress and state legislatures to stand helplessly by as the public's faith in democracy withers away. *See generally Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The needed leeway can be provided, consistent with the First Amendment, in two ways. First, intermediate scrutiny should apply to any campaign finance reform that is justified by reference to something other than the communicative impact of speech. That is clear from this Court's First Amendment jurisprudence since *Buckley*. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) ("*Turner I*"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Second, legislatures should be given substantial deference in the design and enactment of campaign finance laws. *Buckley* provided such deference with regard to contribution limits, and the practical experience of *amici* since *Buckley* with respect to the financing of campaigns has demonstrated that deference is warranted for all such laws. Justice White was correct: the Court should defer to the "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). The Court should allow vindication of the predictive judgments of legislatures as to what campaign finance laws are needed to sustain faith in the electoral process and enhance the

process of governance. As this Court has recognized, legislatures should not be held to a standard of proof that "'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.'" *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (*quoting Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

REASONS FOR GRANTING REVIEW

This Court should grant certiorari to decide whether Vermont's campaign expenditure limitations categorically violate the First Amendment.

1. Certiorari is warranted because there is a direct and acknowledged conflict between the Second Circuit's decision in this case, and the decisions of the Sixth and Tenth Circuits, both of which have invalidated expenditure limitations on the ground that this Court's interpretation of the First Amendment in *Buckley v. Valeo* categorically forecloses such limitations. Resolution of that conflict is a matter of pressing importance, not only for the State of Vermont and many state and local governments that are considering similar expenditure limitations, but also for *amici* and other members of Congress committed to continuing the process of electoral reform on the federal level.

As the Second Circuit recognized in this case, *Buckley* should not be read as imposing an inflexible bar on campaign spending limitations. Reading *Buckley* that way would be anomalous in First Amendment jurisprudence. Even direct content-based restrictions of speech may be sustained if they are a narrowly tailored means of achieving a compelling governmental interest—a point the Court has vindicated directly in the context of the electoral process in

Burson v. Freeman. Thus, where—as here—government can demonstrate the existence of compelling interests in support of campaign expenditure limitations, those limitations should be sustained if they are an appropriately narrowly tailored response to the problem that motivated their enactment. In this critical respect, the Second Circuit was correct and the Sixth and Tenth Circuits were in error in their interpretation of *Buckley*.

2. Moreover, although Vermont's candidate expenditure limitation can withstand, and should be upheld, under *Buckley*'s articulation of the appropriate standard of review, *amici* submit that a more searching re-examination of *Buckley*'s analytical framework is in order. This Court's jurisprudence since *Buckley* has made clear that "[t]he government's *purpose* is the *controlling* consideration" in determining the standard of reviews for laws challenged on First Amendment grounds. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (internal quotation marks omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation marks omitted); *see also Ward*, 491 U.S. at 791. This is true even if the regulation has "an incidental effect on some speakers or messages but not [on] others." *Ward*, 491 U.S. at 791. Indeed, intermediate scrutiny is appropriate for laws that may directly regulate speech activity, as long as the government's justification for doing so is unrelated to the

content of the expression, limited by the regulation. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) ("*Turner II*").[2]

Because the appropriate standard of review depends on the government's "overriding objective" in passing the challenged regulation, *see Turner I*, 512 U.S. at 646, campaign finance laws should be subjected to intermediate scrutiny if they are justified on grounds unrelated to the communicative impact of speech. This conclusion is consistent with *Buckley*. That case applied strict scrutiny to the independent expenditure limits at issue because those limits were justified on the basis of the communicative value of the speech. As this Court explained in *Turner I*, "[t]he Government [in *Buckley*] justified the law as a means of 'equalizing the relative ability of individuals and groups to influence the outcome of elections.' . . . Because the [independent] expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).[3]

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[2] The mere fact that campaign finance laws only address laws related to campaign financing does not mean such laws are aimed at the communicative impact of speech. In *Renton*, for example, this Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content—"adult" films—because the government's "predominate concerns" in preventing "secondary effects" were unrelated to suppression of the regulated speech. *Renton*, 475 U.S. at 47 (quotation marks omitted).

[3] The *Buckley* Court did reject an argument, premised on *United States v. O'Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *See Shrink Missouri*, 528 U.S. at 386 (citing *Buckley*, 424 U.S. at 16). But that is hardly dispositive of *amici*'s argument in favor of intermediate scrutiny.

Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government for the campaign finance law aims at the communicative impact of the speech affected.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance laws—including candidate expenditure limitations of the kind at issue here. First and foremost, regulating campaign finance increases citizens' faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to "the ideas or views expressed" by campaign contributions. *Turner I*, 512 U.S. at 643. As recognized, in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); alteration in original); *see also McConnell*, 540 U.S. at 203-04 (reaffirming compelling interest in preserving citizenry's faith in the electoral process).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, Buckley *Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the government in general, is exacerbated by a public perception of the pervasive influence of money in politics.

It has been clear at least since *Ward* that it is the government's justification that is controlling. *Ward*, 491 U.S. at 791.